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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DONNA SCHULTZ,  
  
Plaintiff,

v.

OLYMPIC MEDICAL CENTER, a  
Washington Public Hospital District, and its  
BOARD MEMBERS, MIKE GLENN, a  
married person, in his capacity as Administrator  
of Olympic Medical Center, LAURA JOSHEL,  
in her capacity as Employee Relations  
Coordinator, STEVE HASELWANDER, in his  
capacity as manager of the Olympic Medical  
Sleep Center, UNITED FOOD AND  
COMMERCIAL WORKERS LOCAL 21, a  
labor organization,,  
  
Defendants.

Case No. C07-5377 FDB

ORDER GRANTING MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS AND DENYING  
MOTION TO EXTEND DISCOVERY  
AND REOPEN DEPOSITION OF DR.  
SUSAN FERRELL

This matter comes before the Court on Plaintiff's Motion to Extend Discovery Deadlines,  
Reopen the Deposition of Dr. Susan Ferrell and Compel Production of Documents. After reviewing

1 all materials submitted by the parties and relied upon for authority, the Court is fully informed and  
2 hereby grants the motion to extend discovery, compel production and reopen the deposition of Dr.  
3 Susan Ferrell.

### 4 **Introduction and Background**

5 Plaintiff Donna Schultz filed this employment discrimination case on July 26, 2007. Plaintiff  
6 claims she was subject to age discrimination and wrongful discharge by her employer Olympic  
7 Medical Center [OMC].

8 Plaintiff was employed with OMC from February 7, 2000 until September 1, 2006 when at  
9 age 60 her employment was terminated. Plaintiff held the position of Cardiac Wellness Technician 1"  
10 until August 1, 2003, when she was transferred to the position of "Polysomnographic Technician 2"  
11 (Sleep Tech). As a Sleep Tech, Plaintiffs primary responsibility involved scoring sleep studies and  
12 transferring this information to a CD-Rom, which was then provided to a physician for review.

13 Steve Haselwander was hired as the Supervisor of OMC's Sleep Disorder Center in  
14 November 2004. Some time in late 2005, Mr. Haselwander informed Plaintiff that a new position of  
15 Neurphysiology Technologist would be created upon approval from OMC's administration.

16 On February 6, 2006, Mr. Haselwander conducted Plaintiff's annual performances appraisal  
17 and commented that Plaintiff "out preforms all other technologists in quality and technical  
18 understanding." On March 24, 2006, Plaintiff was informed that a non-disciplinary counseling  
19 session was scheduled for March 24, 2006, to discuss the Plaintiff's work performance. At this  
20 meeting Plaintiff was presented with a letter documenting poor work scoring studies and a discussion  
21 occurred concerning Plaintiff's unsatisfactory work performance. A plan was devised to conduct four  
22 weekly meetings to provide Plaintiff with feedback on her work performance. Plaintiff did not attend  
23 two of the scheduled followup meetings due to transportation problems or family illness. Plaintiff  
24 continued to be counseled regarding her work performance and was given a disciplinary memo  
25 regarding an incident of non-compliance with HIAA regulations.

1 The job description for the Neurphysiology Technologist position was posted on May 1,  
2 2006. Plaintiff and another employee Lindsay Johnson, requested transfer to this new position.  
3 Lindsay Johnson had been transferred from the position of Medical Office Assistant to a position of  
4 Sleep Tech on February 6, 2006. Ms. Johnson was offered and accepted the new position of  
5 Neurphysiology Technologist. Plaintiff filed a grievance through her union regarding this decision.  
6 The union took no action.

7 Plaintiff believed that Supervisor Haselwander took a personal, as well as professional,  
8 interest in the twenty-four year old Ms. Johnson. Plaintiff alleges that Ms. Johnson was not qualified  
9 for the transfer to Sleep Tech and that she was less qualified than Plaintiff for transfer to the  
10 Neurphysiology Technologist position. Plaintiff also asserts that Mr. Haselwander falsified  
11 documentation relating to Plaintiff's sleep study test scoring with the intention of terminating her  
12 employment. Plaintiff asserts that her work hours were severely reduced and she became an  
13 unofficial part-time employee. Plaintiff's employment was ultimately terminated on September 1,  
14 2006.

### 15 **Pre-trial Discovery**

16 Plaintiff filed this lawsuit on July 26, 2007, alleging that OMC and the individually named  
17 defendants engaged in age discrimination and that she was wrongfully discharged. On January 14,  
18 2008, the Court entered an Order setting a trial date of December 15, 2008 and scheduling pre-trial  
19 discovery to terminate on August 18, 2008.

20 On June 17, 2008, Plaintiff was deposed. At the deposition Defendant entered as exhibits  
21 excerpts of certain sleep study reports purportedly scored by Plaintiff. These exhibits were entered  
22 to establish Defendant's position that Plaintiff's employment was terminated due to the deterioration  
23 in her work scoring sleep studies.

24 On July 15, 2008 Plaintiff served discovery request on Defendants requesting, among other  
25 things, copies of patient sleep studies scored by Plaintiff and those scored by Lindsay Johnson.

1 Plaintiff then scheduled for August 5, 2008, the deposition of Dr. Ferrell, the Medical  
2 Director of the Sleep Lab and the reviewing physician of Plaintiff's sleep study reports. The  
3 deposition notice requested the production at deposition of "[a]ll sleep studies scored by [Plaintiff]  
4 Donna Schultz and [her replacement] Lindsay Johnson from December 2005 until August 2006  
5 and/or all sleep studies scored by Donna Schultz and Lindsay Johnson during the start of your [Dr.  
6 Ferrell] employment at OMC's Sleep Lab until, 2006."

7 Defendant OMC and Dr. Ferrell objected to the request for production on the basis that  
8 pursuant to Fed. R. Civ. P. 30(b) and 34, OMC was entitled to 30 days in which to respond to  
9 Plaintiff's request for production. Defendant further asserted that the request seeks confidential and  
10 privileged information, the request is overly broad and unduly burdensome, and lacks relevance and  
11 is improper in scope. Dr. Ferrell's deposition was taken as scheduled. The requested sleep study  
12 documents were not provided.

13 Plaintiff followed up with two motions to this Court. Plaintiff moved to compel production  
14 of documents pursuant to subpoena duces tecum [Dkt # 31] and motion to extend discovery  
15 deadlines and reopen deposition of Dr. Ferrell. Plaintiff asserts in her motions that she is entitled to  
16 the sleep study reports. Plaintiff further asserts that it was not possible to adequately depose Dr.  
17 Ferrell without the requested sleep study reports. Defendants respond that they had no obligation to  
18 respond to the subpoena duces tecum and that they filed an appropriate response to the request for  
19 production on August 18, 2008. Defendants assert that the requested documents are confidential  
20 and privileged, the request is overbroad, unduly burdensome and seeks irrelevant patient records.  
21 Defendants oppose the reopening of Dr. Ferrell's deposition on the basis of lack of diligence by  
22 Plaintiff and resulting prejudice.

23 **Fed. R. Civ. P. 30(b)(2) and 34**

24 It is well settled that Fed. R. Civ. P. 30(b)(2) provides that any deposition notice which is  
25 served on a party deponent and which requests documents to be produced at the deposition must

1 comply with the thirty-day notice requirement set forth in Fed. R. Civ. P. 34. Rule 30(b)(2) provides  
2 that a “notice to a party deponent may be accompanied by a request under Rule 34 to produce  
3 documents and tangible things at the deposition.” Rule 34 grants respondents thirty days to file a  
4 written response after service of requests for production. A party may not unilaterally shorten that  
5 response period by noticing a deposition and requesting document production at that deposition.  
6 The deposition notice for Dr. Ferrell did not allow Defendants the requisite thirty days to respond to  
7 the request for production of documents. Such procedural infirmity, however, did not, in and of  
8 itself, defeat the discovery. Due to the infirmity, Defendants simply had no duty to produce  
9 documents at Dr. Ferrell's deposition. Defendants did, however, have the obligation to respond with  
10 the responsive documents and/or written objections by the end of the thirty-day period. Defendants  
11 served and filed its written objections to the requested production within that time frame, on August  
12 18, 2008. The fact that the deposition notice failed to give Defendants thirty days to respond is  
13 therefore immaterial now, except as it relates to the issue of whether Plaintiff should be allowed to  
14 reopen Dr. Ferrell's deposition.

#### 15 **Confidential and privilege information objections**

16 The Court will first address Defendants’ objection that the request for production calls for  
17 production of patient records protected by the Health Insurance Portability and Accountability Act  
18 (HIAA) and Washington State Health Care Information Act, and which may not be subject to  
19 disclosure to third parties without patient authorization.

20 HIAA contains special rules governing the disclosure of “individually identifiable health  
21 information.” See Citizens for Health v. Leavitt, 428 F.3d 167, 172 (3<sup>rd</sup> Cir. 2005). The “privacy  
22 rule,” prohibits care providers from using or disclosing an individual's “protected health information”  
23 except where there is patient consent or the use or disclosure is for “treatment, payment, or health  
24 care operations.” Leavitt, at 173. “Protected health information” is health information that identifies  
25 the individual or with respect to which there is a reasonable basis to believe the information can be

1 used to identify the individual. The redaction of information that identifies the individual patient or  
2 that can be used to identify the individual removes the application of the HIAA privacy rule.

3 Similarly, the Washington State Health Care Information Act defines “health care  
4 information” as “any information, whether oral or recorded in any form or medium, that identifies or  
5 can readily be associated with the identity of a patient and directly relates to the patient's health care.  
6 RCW 70.02.010(6). See Wright v. Jeckle, 121 Wn. App. 624, 630, 90 P.3d 65 (2004)(definition of  
7 health care information has two requisites: patient identity and information about the patient's health  
8 care. Disclosure of one requisite without the other is not a violation of the Health Care Information  
9 Act).

10 The Plaintiff has indicated that she has no objection to the redaction of individual  
11 identification markers contained in any requested sleep study document. Accordingly, Defendant may  
12 redact from the requested sleep study documentation any patient identity information subject to  
13 HIAA or Washington State privacy rules.

14 HIPAA's privacy provisions further allow for disclosure of medical information in the course  
15 of judicial proceedings. However, the Act places certain requirements on both the medical  
16 professional providing the information and the party seeking it. Under HIAA, disclosure is permitted,  
17 pursuant to a court order, subpoena, or discovery request when the healthcare provider “receives  
18 satisfactory assurance from the party seeking the information that reasonable efforts have been made  
19 by such party to secure a qualified protective order.” 45 C.F.R. § 164.512(1)(e)(ii)(b). The protective  
20 order must prohibit “using or disclosing the protected health information for any purpose other than  
21 the litigation,” and “[r]equire the return to the [health care provider] or destruction of the protected  
22 health information ... at the end of the litigation or proceeding.” 45 C.F.R. § 164.512(1)(e)(v).

23 Here, the parties have stipulated to a protective order which protects medical records. [Dkt.  
24 #23] The protective order satisfies the requirements of HIAA because it (1) prohibits the parties from  
25 using or disclosing the protected health information for any purpose other than the litigation or

1 proceeding for which such information was requested; and (2) requires the return or destruction of  
2 the protected material at the conclusion of the litigation. Thus, the protective order is adequate under  
3 HIAA to protect third party medical records.

4 The Court finds no merit to Defendant's confidentiality and privilege objections.

### 5 **Relevancy objections**

6 The Court will next turn to Defendants' objection that the requests seek irrelevant  
7 information. Relevancy is broadly construed, and a request for discovery should be considered  
8 relevant if there is any possibility that the information sought may be relevant to the subject matter to  
9 the action. Oakes v. Halvorsen Marine Ltd., 179 F.R.D. 281, 283 (C.D. Cal.1998). A request for  
10 discovery should be allowed "unless it is clear that the information sought can have no possible  
11 bearing on the subject matter of the action. Id. When the discovery sought appears relevant, the  
12 party resisting the discovery has the burden to establish the lack of relevance by demonstrating that  
13 the requested discovery does not come within the broad scope of relevance as defined under Fed. R.  
14 Civ. P. 26(b)(1), or is of such marginal relevance that the potential harm occasioned by discovery  
15 would outweigh the ordinary presumption in favor of broad disclosure. Oleson v. Kmart Corp., 175  
16 F.R.D. 560, 565 (D. Kan. 1997).

17 Defendants contend that the request seeks irrelevant information to the extent it asks for the  
18 production of documents "not directly related to the claims or defenses in this case." The  
19 Defendants, however, have made it clear that their defense to this action is that an alleged  
20 deterioration in Plaintiff's work in scoring sleep studies is the basis for her termination from  
21 employment. The Court finds that the request is not overly broad in its scope. Plaintiffs are entitled  
22 to the requested documents relating to Plaintiff's scoring of sleep studies. The Court will therefore  
23 overrule this particular objection.

24 The Court does, however, find the requested sleep study scoring reports conducted by  
25 Lindsay Johnson to be irrelevant. These sleep studies have no relevance to the assertion that Plaintiff

1 was terminated due to the deterioration in her work. Nor has there been any allegation that Ms.  
2 Johnson's conduct in scoring sleep studies had a bearing on her promotion over Plaintiff.

3 **Overly broad and unduly burdensome**

4 Defendants next contend that the request is overly burdensome information because its  
5 temporal scope is overly broad. Defendants contends the temporal scope is too broad because  
6 Plaintiff seeks sleep studies scored by Plaintiff from January 2000 to present. Defendants also claim  
7 that the privileged nature of the documents will require obtaining hundreds of patient authorizations  
8 and require thousands of redactions of patient identifiers. As noted by Defendants, Plaintiff did not  
9 begin scoring sleep studies until her transfer to Sleep Tech on August 1, 2003. Defendants state that  
10 Plaintiff's subpoena seeks production of approximately 555 patient sleep studies and that the each  
11 sleep study, if printed off the software, consists of approximately one thousand pages. Further,  
12 patient identifiers appear on each page of the reports. Defendants assert that production of this  
13 amount of documentation, with necessary redactions of patient identifiers is overly burdensome.

14 In an effort to lesson the burden, Defendants offer to produce a sampling of the requested  
15 documents and those introduced in Dr. Ferrell's deposition. Plaintiff would be permitted to view these  
16 sleep studies on a computer in the Sleep Lab under appropriate supervision to ensure patient records  
17 protection.

18 The Court is not persuaded by this argument. Nor does the Court find Defendants' proposal  
19 sufficient. A party resisting discovery on the grounds that a request is overly broad has the burden to  
20 support its objection, unless the request is overly broad on its face. This includes any objection to the  
21 temporal scope of the request. Swackhammer v. Sprint Corp. PCS, 225 F.R.D. 658 (D. Kan. 2004).  
22 The Court also recognizes that the scope of discovery is particularly broad in employment  
23 discrimination cases. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). The nature of  
24 the defense presented by Defendants, deterioration in performance, requires that Plaintiff, (and likely  
25 the Defendants) be able to compare and contrast over time the sleep study scoring conducted by

1 Plaintiff. While the redaction of identifying markers may be burdensome, the Court is not convinced  
2 it is unduly burdensome.

3 Defendants are required to provide Plaintiff access to the sleep study reports scored by  
4 Plaintiff. Defendants can comply with this discovery by providing hard copies or by providing  
5 Plaintiff the ability to view the sleep studies on a computer in the Sleep Lab facility. Plaintiff is  
6 entitled to make copies, at her own expense, of any of these sleep studies she deems appropriate to  
7 this case. The parties shall ensure that all documents are protected from disclosure to third parties in  
8 accordance with HIAA and the Washington State Health Care Information Act.

9 In light of the above, the Court will overrule Defendants' objections that the requests are  
10 overly broad and unduly burdensome.

### 11 **Reopening of the deposition of Dr. Ferrell**

12 Although possibly imprudent, the Rule 34 request for production of sleep studies was timely  
13 as Defendants had until the last day of discovery to respond. The Court must address Plaintiff's  
14 request that she be allowed an extension of the discovery cutoff to reopen the deposition of Dr. Susan  
15 Ferrell so that she may be examined in regard to the disclosed sleep study reports.

16 Rule 16 of the Federal Rules of Civil Procedure governs deadlines and dates set by the court.  
17 A scheduling order controls the subsequent course of an action unless it is modified by the court.  
18 Fed. R. Civ. P. 16(e); Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608 (9<sup>th</sup> Cir. 1992). A  
19 scheduling order cannot be modified "except upon a showing of good cause." Fed. R. Civ. P. 16(b);  
20 Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1087 (9<sup>th</sup> Cir. 2002). Rule 16(b)'s good  
21 cause standard primarily considers the diligence of the party seeking the amendment, and the court  
22 may modify the scheduling order if it cannot reasonably be met despite the diligence of the party  
23 seeking the extension. Johnson, at 609. A party demonstrates good cause for the modification of a  
24 scheduling order by showing that, even with the exercise of due diligence, he or she was unable to  
25 meet the timetable set forth in the order. Zivkovic, at 1087. Although the existence or degree of

1 prejudice to the party opposing the modification might supply additional reasons to deny a motion,  
2 the focus of the inquiry is upon the moving party's reasons for seeking modification. Johnson, at 609.  
3 The decision to modify a scheduling order is within the broad discretion of the district court.  
4 Johnson, at 607; Miller v. Safeco Title Ins. Co., 758 F.2d 364, 369 (9<sup>th</sup> Cir. 1985).

5 The Court finds that Defendant has made An insufficient showing of good cause to extend  
6 discovery and reopen the deposition of Dr. Ferrell. As previously address, a request for production of  
7 documents at deposition is subject to the thirty-day period to respond as provided in Rlue 34. See,  
8 Rule 30(b)(2). Plaintiff did not make a Rule 34 request for production of documents until thirty days  
9 prior to August 18, 2008; the cutoff date for discovery. Accordingly, Defendants had no obligation  
10 to respond to the request for discovery until the last day of discovery. Through Plaintiff's own  
11 actions the sleep study documents were unavailable at the time of conducting Dr. Ferrell's deposition.  
12 Plaintiff has not shown that with the exercise of due diligence, she was unable to comply with this  
13 Court's scheduling order so as to obtain Rule 34 discovery prior to deposing Dr. Ferrell. Good cause  
14 has not been shown to extend discovery and reopen the deposition of Dr. Ferrell.

### 15 Conclusion

16 For the above stated reasons the Court will compel production of the sleep studies. Discovery  
17 will not be reopened, other than to provide the Rule 34 production, and Plaintiff is not entitled to  
18 reopen the deposition of Dr. Susan Ferrell.

19 ACCORDINGLY;

20 IT IS ORDERED:

21 Plaintiff's motion to compel production [Dkt. # 33] is **GRANTED**. Defendants shall produce  
22 the sleep study documents in accordance with the terms of this order. Patient identifying markers  
23 shall be redacted and the documents subject to the protective order.

24 Plaintiff's motion to extend discovery and reopen the deposition of Dr. Ferrell [Dkt. # 33] is  
25 **DENIED**.

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DATED this 22<sup>nd</sup> day of August, 2008.

A handwritten signature in black ink, appearing to read 'Frank D. Burgess', written over a horizontal line.

FRANKLIN D. BURGESS  
UNITED STATES DISTRICT JUDGE